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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 346

VON DER AHE VAN LINES, INC.,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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July, 1966

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VON DER AHE VAN LINES, INC.,

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UNITED STATES OF AMERICA,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Von Der Ahe Van Lines, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled case on April 15, 1966.

### CITATIONS TO OPINION BELOW

The Opinion of the Court of Claims (R. 59-63), printed in Appendix B hereto, *infra*, pp. 13-17, is reported in 358 F.2d 999.

## JURISDICTION

The judgment of the Court of Claims was entered on April 15, 1966. (R. 59; p. 13, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

## QUESTION PRESENTED

Whether a claim against the Government for compensation for transporting Government shipments between points in a foreign country is governed by the three-year statute of limitations set forth in Section 204a of the Interstate Commerce Act, 49 U.S.C. §304a.

## STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. §2501, and Sections 202(a), 203(a)(11), and 204a of the Interstate Commerce Act, 49 U.S.C. §§302(a), 303(a)(11), and 304a. They are printed in Appendix A, *infra*, p. 11.

## STATEMENT

In the years 1958, 1959 and 1960, petitioner, a common carrier, transported 364 shipments of household goods for the Department of Defense between points in the United States and points in Germany. (R. 59). A government bill of lading was issued on each shipment covering the entire transportation from origin to destination. (R. 59). After completion of this transportation, petitioner billed respondent, and was paid, on the basis of the rates set forth in Military Rate Tender I.C.C. No. 4, for each of the three legs of this transportation, *viz.*, the land transportation in the United States, the ocean transportation, and the land transportation in Germany. (R. 59-60). Military Rate Tender I.C.C. No. 4 was published

and submitted to the Government by the Movers' & Warehousemen's Association of America, Inc., acting as agent for petitioner and other carriers. (R. 60).

Some time after the completion of this transportation, petitioner discovered that it had underbilled respondent for a portion of this transportation, *viz.*, the land transportation within Germany, and petitioner, accordingly, submitted supplemental bills to respondent covering that portion of the transportation. (R. 60). Respondent, acting through the General Accounting Office, refused to pay petitioner's supplemental bills. (R. 60).

More than three years, but less than six years, after the accrual of its cause of action, petitioner filed suit against respondent in the United States Court of Claims. The jurisdiction of the Court of Claims was invoked under 28 U.S.C. §1491. The statute of limitations generally applicable in the Court of Claims is six years. 28 U.S.C. §2501.

Petitioner's suit in the Court of Claims was solely for the recovery of the freight charges applicable to the transportation performed for respondent within Germany. The case was heard by the Court on petitioner's Motion, and respondent's Cross-Motion, for summary judgment. (R. 60).

The Court of Claims held that petitioner's suit was barred by the three year statute of limitations set forth in Section 204a of the Interstate Commerce Act, 49 U.S.C. §304a. (R. 63). In reaching this conclusion, the Court did not find that this statute applied by its terms to petitioner's claim,[1] but, relying on

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[1] In transporting the shipments involved, petitioner acted as a motor carrier subject to Part II of the Interstate Commerce Act solely with respect to the land transportation in the United States. That portion of the transportation was not involved in the subject suit.

*United States v. Francis*, 320 F.2d 191 (1963), held that petitioner had "brought itself within [the] purview of the Interstate Commerce Act, including Section 204a" by reason of its participation in Military Rate Tender I.C.C. No. 4, since it was stated in this tender that the rates contained therein were offered to the Government "pursuant to Section 22 of the Interstate Commerce Act, or other appropriate statutory authority." (R. 62). In addition, the Court stated that the failure to apply the three year statute of limitations would result in a "splitting of [petitioner's] cause of action." (R. 63).

## REASONS FOR GRANTING THE WRIT

1. In applying the statute of limitations set forth in Section 204a of the Interstate Commerce Act to transportation performed within Germany, the decision of the Court below contravenes the express terms of the Act, the intent of Congress, and decisions of this Court and other Courts.

Section 202(a) of the Interstate Commerce Act, 49 U.S.C. §302(a), provides:

> "The provisions of this part [which encompasses section 204a] apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce. . . ."

Section 203(a)(11) of the Act, 49 U.S.C. §303(a)(11), provides as follows:

> "The term 'foreign commerce' means commerce, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water, (A) between any place in the United States and

> any place in a foreign country, or between places in the United States through a foreign country; or (B) between any place in the United States and any place in a Territory or possession of the United States *insofar as such transportation takes place within the United States.*" (Emphasis added).

(See also letter from the Interstate Commerce Commission to Senate Committee on Interstate and Foreign Commerce, appended to Senate Report No. 2258, 81st Cong., 2nd Sess. (1950)).

First, we submit that it is beyond reasonable doubt that the provisions of the Interstate Commerce Act, and, more particularly, the provisions of Part II (the Motor Carrier Act) apply not to carriers as such, but to *transportation*, and apply *only insofar as such transportation takes place within the boundaries of the United States*. This Court has likewise recognized that the provisions of the Interstate Commerce Act are not to be given extraterritorial effect. *United States v. Pennsylvania Railroad Company*, 323 U.S. 612, 65 S.Ct. 471 (1945).

Second, narrowing our attention to Section 204a, consideration of the language and legislative history of that section makes clear that it was never intended that the statute of limitations contained therein was to apply to claims for freight charges for transportation performed outside of the United States.

Section 204a of the Act, as it presently reads, was enacted as part of the Transportation Act of 1958. (Public Law No. 85-762). The Reports of both the Senate and House Committees on Interstate and Foreign Commerce which accompanied the bill which was enacted, make clear that the three year statute of limitations was to apply only to causes of action

"arising under the Interstate Commerce Act," and that the term "charges" in Section 204a refers only to charges which are subject to the jurisdiction of the Interstate Commerce Commission. (See Senate Report No. 334, 85th Cong., 1st Sess. 4-5 (1957), and House Report No. 2346, 85th Cong., 2nd Sess. 3 (1958)). (See also letter from the Interstate Commerce Commission appended to House Report, *Ibid.*, p. 7).[2]

Further, we point out that although the term "charges" is not specifically defined in Section 204a, the term "overcharges" is defined in Section 204a(5) as follows:

> "(5) The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission."

In the instant case, petitioner's cause of action did not "arise under the Interstate Commerce Act" and the charges which were the subject of suit are not charges subject to the jurisdiction of the Interstate Commerce Commission.

Third, it has been recognized that a carrier subject to the Interstate Commerce Act with respect to some of its operations, may engage in other transportation activities which lie outside the scope of the Act, and that the provisions of the Act do not apply to such other activities, *Kansas City Southern Railway*

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[2] The 1958 Amendment extended the limitations period in Section 204a from two to three years. The legislative history of the prior two-year statute also makes clear, however, that this limitations provision was intended to apply only to claims for freight charges which are subject to the Interstate Commerce Act. (See Senate Report No. 83, 81st Cong., 1st Sess. 1-2 (1949), and House Report No. 766, 81st Cong., 1st Sess. (1949)).

*Company v. United States*, 282 U.S. 760, 764, 51 S.Ct. 304, 306 (1931). More specifically, it has also been held that the limitations provisions contained in the Interstate Commerce Act do not apply to a suit by a carrier subject to the Act for the recovery of transportation charges which are not subject to the Act. *Thompson, Trustee, Great Northern R.R. Co. v. Millwhite Company*, 292 S.W. 2d 148 (1956), *McMahone v. Republic Van & Storage Co.*, 382 Pac. 2nd 875 (1963). In the *Thompson* case, a railroad (subject to Part I of the Act) brought suit for the recovery of both interstate and intrastate freight charges. The Court held that the limitation provision of the Interstate Commerce Act applied to the claim for interstate freight charges, but not to the claim for intrastate freight charges.

As noted above, the Court below did not hold that Section 204a applied, by its terms, to petitioner's claim, but that petitioner "brought itself within [the] purview of the Interstate Commerce Act" by reason of the statement in the applicable rate tender that the rates contained therein were offered "pursuant to Section 22 of the Interstate Commerce Act, or other appropriate statutory authority." (R. 62).

We submit that the provisions of the Interstate Commerce Act either apply or do not apply to specified transportation, and that one cannot, voluntarily or by agreement, either bring one's self or one's activities within the scope of the Act, or remove one's self or one's activities from the coverage of the Act. Were the situation otherwise, the regulatory scheme established by the Interstate Commerce Act would be readily nullified.

Further, we point out that the reference in petitioner's Rate Tender to "Section 22 of the Interstate Commerce Act or other appropriate statutory author-

ity" is no more than a standard, "boiler-plate" reference which appears in almost all rate tenders submitted to the Government, and that this statement is made because *some* of the charges contained in these tenders *are* submitted "pursuant to Section 22" of the Act.[3] This statement in petitioner's rate tender cannot, however, be construed to expand the scope of the Interstate Commerce Act so as to subject to the provisions of that Act transportation, or charges for transportation, to which the Act does not apply. Stated differently, even if petitioner could be considered to have "incorporated by reference" the provisions of the Interstate Commerce Act, petitioner could, at most, be bound by the provisions of the Act, and, as discussed above, the Act does not apply to transportation outside the United States, and Section 204a of the Act, even assuming that it had been *expressly* and *specifically* incorporated, does not apply to claims for freight charges covering such transportation.

One additional matter in the opinion of the Court below requires comment, *viz.*, the Court's statement that the failure to apply the three year statute of limitations would result in "the splitting of [petitioner's] cause of action." (R. 63). With all due respect, we submit that the Court grievously erred in so stating. As the Court noted, the shipments which are the subject of this suit each moved on a single Government bill of lading. (R. 59). There was thus a single contract of carriage on each shipment. If, therefore, a carrier were to bring suit within three years for the transportation charges applicable to the

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[3] Thus, in the instant case, there is no question that the charges covering the transportation within the United States were so-called "Section 22 quotations," and were subject to the provisions of the Act.

portion of the transportation performed in the United States, and then, after the three-year period but within six years, attempt to bring a second suit for the recovery of freight charges applicable to the transportation performed outside the United States (as the Court hypothesized), such second suit *would be foreclosed* simply as a matter of *res judicata*. A single contract gives rise to a single cause of action, and successive suits cannot be maintained on the same contract. (See, generally, 1 Corpus Juris. Sec. §102). This, however, has nothing whatever to do with the statute of limitations.

2. The decision below limits the jurisdiction of the Court of Claims, involves the interpretation of a federal statute which has not been authoritatively interpreted by this Court, and could have an effect upon claims arising on all international traffic transported for respondent. In the latter connection, we respectfully advise the Court that there are in excess of sixty cases *now* pending in the Court of Claims which may be affected by this decision.

3. Lastly, the Court of Claims was the Court of first instance in this case, and unless this petition is granted, a decision (which we are convinced is wrong) which potentially affects thousands of claims would be allowed to stand without the benefit of consideration or review by any other tribunal.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Martin Sterenbuch

*Of Counsel*

July, 1966

## APPENDIX A — STATUTES INVOLVED

A. General Statute of Limitations in U.S. Court of Claims, 28 U.S.C. §2501:

"Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

B. Pertinent provisions of Interstate Commerce Act:

Section 202(a), 49 U.S.C. §302(a):

"The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreigh commerce . . ."

Section 203(a)(11), 49 U.S.C. §303(a)(11):

"The term 'foreign commerce' means commerce, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water, (A) between any place in the United States and any place in a foreign country, or between places in the United States through a foreign country; or (B) between any place in the United States and any place in a Territory or possession of the United States insofar as such transportation takes place within the United States."

Section 204a, 49 U.S.C. §304a:

"(1) All actions at law by common carriers by motor vehicle subject to this part for the recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.

* * *

"(5) The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.

* * *

"(7) The provisions of this section 204a shall extend to and embrace all transportation of property or passengers for or on behalf of the United States in connection with any action brought before any court or by or against carriers subject to this part: *Provided, however,* That with respect to such transportation of property or passengers for or on behalf of the United States, the periods of limitation herein provided shall be extended to include three years from the date of (A) payment of charges for the transportation involved, or (B) subsequent refund for overpayment of such charges, or (C) deduction made under section 322 of the Transportation Act of 1940 (49 U.S.C. 66), whichever is later."

## APPENDIX B

# In the United States Court of Claims

No. 139–64

(Decided April 15, 1966)

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VON DER AHE VAN LINES, INC. v. THE UNITED STATES

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*Francis Forti*, attorney of record, for plaintiff.
*John C. Ranney*, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

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Before COWEN, *Chief Judge;* JONES, *Senior Judge;* LARAMORE, DAVIS, and COLLINS, *Judges.*

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ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

COWEN, *Chief Judge*, delivered the opinion of the court:

In the years 1958, 1959, and 1960 plaintiff, a common carrier by motor vehicle, transported some 364 shipments of household goods for the defendant between points in the United States and Germany. A Government bill of lading was issued on each shipment to cover the complete service from origin to destination, including the land transportation in the United States, the crossing of the Atlantic Ocean, and the land transportation in Germany. After completion of the service, plaintiff submitted its bills for payment on Standard Form 1113, entitled Public Voucher For Transportation Charges. The bills were paid prior to audit, pursuant to Section 322 of the Transportation Act of 1940, 54 Stat. 955, as amended, 49 U.S.C. § 66, on the basis of the rates for each

of the three legs of the trips set forth in Military Rate Tender I.C.C. No. 4.

Payment was completed on the vouchers on September 17, 1959. More than 3 years after plaintiff had received the payments, it submitted to the General Accounting Office claims for undercharges on that portion of the transportation which moved within Germany. Plaintiff stated that in submitting its original bills, it had used an incorrect rate for the movements in Germany. The General Accounting Office denied the claims on the basis of that part of Section 322 of the Transportation Act of 1940 which states that "every claim cognizable by the General Accounting Office for charges for transportation within the purview of this section shall be forever barred unless such claim shall be received in the General Accounting Office within three years * * * "

Military Rate Tender I.C.C. No. 4, in accordance with which plaintiff offered its services and computed its charges, contains rates on shipments of household goods between points within the United States and points within the Republic of Germany. The rate tender was published and offered to the Government by the Movers and Warehousemen's Association of America, Inc., acting as agent for plaintiff and other carriers.

Defendant has countered plaintiff's motion for summary judgment with a cross-motion for summary judgment in which defendant contends that plaintiff's claims are barred by the 3-year statute of limitations set forth in Section 204a of the Interstate Commerce Act, 49 U.S.C. § 304a (1958 ed.). This section provides in pertinent part as follows:

> (1) All actions at law by common carriers by motor vehicle subject to this chapter for the recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.
>
> * * * * *
>
> (7) The provisions of this section shall extend to and embrace all transportation of property or passengers for or on behalf of the United States in connection with any action brought before any court by or against carriers subject to this chapter: *Provided, however*, That with respect to such transportation of property or passengers for or on behalf of the United States, the periods of

> limitation herein provided shall be extended to include three years from the date of (A) payment of charges for the transportation involved, or (B) subsequent refund for overpayment of such charges, or (C) deduction made under section 66 of this title, whichever is later.

In its petition filed in this court plaintiff alleges that it is a common carrier by highway of property in interstate commerce. If plaintiff had sued to recover freight charges for that portion of the carriage which took place within the United States, it is clear that the above-quoted 3-year statute of limitations would require dismissal of the action. However, plaintiff asserts that, since the transportation for which recovery is sought occurred wholly in Germany, Section 204a of the Interstate Commerce Act is not applicable and that plaintiff's suit is governed by the 6-year statute of limitations, 28 U.S.C. § 2501. Plaintiff has cited a number of cases for the proposition that the Interstate Commerce Commission has no authority to regulate transportation in foreign countries. If that were the only question presented to us, we might agree with plaintiff's position. However, the narrow issue to be decided here is whether under the particular facts of this case, plaintiff has subjected itself to the time limitation provisions of the Interstate Commerce Act as contained in Section 204a thereof.

A related and similar question was considered by the Ninth Circuit in *United States* v. *Francis*, 320 F. 2d 191 (9th Cir. 1963). In that case the United States sued to recover overcharges on shipments which were transported on Government bills of lading by a motor carrier between points solely within the State of California. The carrier defended on the ground that the United States could not bring an action for restitution under Section 322 of the Transportation Act of 1940, because the shipments were all intrastate and that in performing the transportation, he was not subject to the Interstate Commerce Act. However, the carrier was a party to a quotation of rates tendered to the Government under the authority of Section 22 of the Interstate Commerce Act, 49 U.S.C. § 22, and the freight was transported pursuant to the terms of the quotation. In resolving the question, the court said at page 195:

> By becoming a party to the Loretz [Section 22] Quotation, appellee must be considered to be within the meaning of the Section 322 phrase "common carrier subject to the Interstate Commerce Act." Appellee, having voluntarily become bound as a carrier "subject to the Interstate Commerce Act," cannot now claim it is not so bound. We hold he has waived any claim he is excluded under Section 322.

The rationale of the decision is not fully set forth in the court's opinion, and factual situations may arise in which we would hold that the rule announced in the quoted portion of the opinion does not apply. However, we have concluded that the principle stated in *Francis* is controlling in this case, because of the following facts:

(1) Each shipment was made on a through bill of lading covering the complete movement of household goods between points in the United States and points in the Republic of Germany. Plaintiff was shown as both the origin and the destination carrier on each bill of lading.

(2) Each of the Government bills of lading refers to Movers and Warehousemen's Association of America, Inc., Military Rate Tender No. 4.

(3) Military Rate Tender I.C.C. No. 4, in effect at the time the shipments moved, is published by plaintiff's agent and contains rates on shipments of household goods between points within the United States and points in the Republic of Germany. The rate tender shows that the participating carriers, including plaintiff, quoted and offered to the Government specified rates and charges for such transportation services "pursuant to Section 22 of the Interstate Commerce Act, or other appropriate statutory authority."

By this combination of factual circumstances, we think that plaintiff brought itself within purview of the Interstate Commerce Act, including Section 204a, 49 U.S.C. § 304a. The bill of lading is the contract of carriage upon which the carrier's action is based. *St. Louis I. Mt. and Southern Ry.* v. *Starbird*, 243 U.S. 592 (1917); *Johnson Motor Transport* v. *United States*, 137 Ct. Cl. 892, 896, 149 F. Supp. 175 (1957); *United States* v. *Louisville & N. R.R.*, 221 F. 2d 698 (6th Cir. 1955). It is a well accepted general rule that a single cause of action or an entire claim or demand based upon a contract

cannot be split or divided for the purpose of maintaining separate suits on the various individual parts, nor can a party divide the grounds of recovery and maintain successive actions for the cause of action thereon. *United States* v. *Pan-American Petroleum Co.*, 55 F. 2d 753 (9th Cir. 1932), *cert. denied*, 287 U.S. 612 (1932); *Campbell* v. *Village of Silver Bay, Minnesota*, 315 F. 2d 568 (8th Cir. 1963). While there are recognized exceptions to this rule, we think its purpose is served in this case. Plaintiff's claim grows out of the same facts on a single contract for a unified carriage between the same parties. Plaintiff, who was a common carrier by motor vehicle in interstate commerce, undertook to transport the household goods from origin to destination pursuant to a Section 22 Quotation, and the fact that it may have rendered a portion of the transportation services as the agent of another does not operate to change plaintiff's status. *United States* v. *Smith*, 215 F. 2d 217 (6th Cir. 1954).

The adoption of plaintiff's position would require the splitting of its cause of action and the application of two statutes of limitations to a single contract of carriage. Thus, under plaintiff's view it could bring suit against the United States upon the bills of lading for undercharges on freight transported within the United States within 3 years from the date the cause of action accrued, and then wait almost 3 years more to file suit on the same bills of lading for that portion of the transportation services performed within Germany. Under the facts recited above, we therefore conclude that plaintiff's cause of action is barred by the provisions of Section 204a of the Interstate Commerce Act, 49 U.S.C. § 304a. Accordingly, plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted, and plaintiff's petition is dismissed.

In view of the foregoing disposition of this action, we do not reach, nor have we considered defendant's broad position that 49 U.S.C. § 304a applies to all actions at law brought by common carriers by motor vehicle for the recovery of freight charges against the Government.

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# In the Supreme Court of the United States

OCTOBER TERM, 1966

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No. 346

VON DER AHE VAN LINES, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In 1958, 1959 and 1960, petitioner, a common carrier by motor vehicle, transported household goods for the government between the United States and Germany. Each shipment moved under a single through bill of lading covering the entire transportation service from domestic origin to foreign destination. Petitioner's bills for the transportation were paid in full upon presentation, the latest bill being paid on September 17, 1959.

More than three years later, petitioner filed claims with the General Accounting Office for additional compensation, asserting that it had undercharged the United States by applying an incorrect rate to the land transportation in Germany. These claims were denied by the General Accounting Office on the basis of the provision in Section 322 of the Transportation Act of 1940, as amended, 49 U.S.C. 66, that "every claim cognizable by the General Accounting Office for charges for transportation within the purview of this section shall be forever barred unless such claim shall be received in the General Accounting Office within three years * * * from the date of * * * payment of charges for the transportation involved * * *."

Thereafter, on May 22, 1964—more than four-and-one-half years after the last payment by the government—petitioner instituted this action in the Court of Claims to recover the asserted undercharges. The court unanimously dismissed the suit on the ground that it was barred by the three-year statute of limitations in Section 204a(1) of the Interstate Commerce Act, 49 U.S.C. 304a(1). In so holding, the court found it unnecessary to reach the question whether that provision applied to petitioner by its own terms. Rather it pointed out that "the narrow issue to be decided here is whether under the particular facts of this case, [petitioner] has subjected itself to [these] time limitation provisions * * *" (Pet. App. 15; 358 F. 2d 999, 1000). The decision of the court below is correct and there is no occasion for review by this Court.

Section 204a(1) imposes a three-year limitation on "[a]ll actions at law by common carriers by motor vehicle subject to [Part II of the Interstate Commerce Act] for the recovery of their charges, or any part thereof * * *."[1] This limitations period has been expressly made applicable to "all transportation of property * * * on behalf of the United States in connection with any action brought before any court by or against carriers subject to" Part II of the Act. Section 204a(7), 49 U.S.C. 304a(7). Finding that petitioner was a "common carrier by motor vehicle subject to" the Act, the court below correctly held that it was bound by the time bar of Section 204a.

The court's finding was premised on the fact that each shipment was based on a through bill of lading (showing petitioner as both the origin and the destination carrier) covering the complete movement of the goods in question, and that each bill of lading referred to Military Rate Tender I.C.C. No. 4. This tender, published by petitioner's agent, expressly offered rates for transportation between the United States and Germany "pursuant to Section 22 of the Interstate Commerce Act [49 U.S.C. 22], or other appropriate statutory authority." Thus, the court found, the shipments in question were explicitly made "subject to" the Act[2] within the meaning of Section 204a. The Ninth Circuit reached a similar conclusion

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[1] It is not disputed that petitioner's claim accrued on the date of payment by the government. See 49 U.S.C. 304a(7).

[2] The provisions of Section 22 are made applicable to common carriers by motor vehicle by Section 217(b), 49 U.S.C. 317(b).

in an analogous situation (see *United States* v. *Francis*, 320 F. 2d 191, 195),[3] and no decision of any court is in conflict with these rulings.

Although the court below found it unnecessary to reach the question, we point out that, even in the absence of Military Rate Tender No. 4, petitioner would be covered by the statutory limitations period. Section 204a does not deal with the regulatory powers of the Interstate Commerce Commission; it concerns only actions at law for recovery of charges. Therefore cases limiting the Commission's jurisdiction to transportation taking place within the United States are inapposite. The sole question here is whether petitioner is a carrier "subject to" Part II of the Act. Part II, in terms, applies "to the transportation of * * * property by motor carriers engaged in interstate or foreign commerce * * *." Section 202(a), 49 U.S.C. 302(a). As defined in Section 203(a)(11), 49 U.S.C. 303(a)(11), "foreign commerce" includes transportation "partly by motor vehicle and partly by rail, express, or water * * * between any place in the United States and any place in a foreign country * * *." The shipments involved here—each under a through bill of lading covering the entire trip from

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[3] In *Francis* the court held that a carrier was subject to an action for restitution by the government under Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, with respect to the transportation of merchandise wholly within a single State. Since those shipments, like the ones involved here, were made with reference to a rate quotation filed pursuant to Section 22 of the Act, the court ruled that the defendant was a "common carrier subject to the Interstate Commerce Act" within the meaning of Section 322.

the point of origin in the United States to the ultimate foreign destination—clearly were in foreign commerce within the purview of the Act. This is so even if, as petitioner appears to contend, "foreign commerce" is, for all purposes, limited to the portion of transportation taking place within the United States. Since the bills of lading involved here, which are the contracts upon which petitioner's action must be based,[4] clearly covered transportation of property in foreign commerce, petitioner cannot escape the fact that it is a carrier subject to the Act and therefore bound by the limitations period of Section 204a.

It should be noted that Section 204a(7), *supra*, was expressly designed to cure the inequitable and anomalous situation created by the application of different limitations periods to similar lawsuits. For example, it had been held that suits by carriers against the government were governed by the general six-year limitation in the Court of Claims Act (*Southern Pacific Co.* v. *United States*, 62 Ct. Cl. 391) but that suits by the government against carriers were governed by the two-year limitation in the Interstate Commerce Act. See S. Rep. No. 334, 85th Cong., 1st Sess., in 1958 U.S.C. Cong. & Admin. News 3925-3926. Section 204a alleviated this situation by providing a uniform, and relatively short, limitations period applicable to all carriers and shippers subject to the Act. See H. Rep. No. 2346, 85th Cong., 2d Sess.,

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[4] *St. Louis, I. Mt. & So. Ry. Co.* v. *Starbird*, 243 U.S. 592; *Johnson Motor Transport* v. *United States*, 149 F. Supp. 175 (Ct. Cl.); *United States* v. *Louisville & N.R.R. Co.*, 221 F. 2d 698 (C.A. 6).

p. 3; cf. 49 U.S.C. 66. Petitioner would now create a new anomaly by applying the Interstate Commerce Act's three-year limitation to suits based on the domestic portion of contracts of carriage from this country to another and the Court of Claims Act's six-year limitation, in suits *against* the government.[5] for the foreign portion of the same cause of action. Such a result is plainly contrary to the purpose of Section 204a.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

THURGOOD MARSHALL,
*Solicitor General.*

AUGUST 1966.

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[5] Under petitioner's theory suits *by* the government for overcharges with reference to the foreign portion of a single through shipment apparently would not be subject to any statute of limitations whatever. In suits between private parties, it is unclear what limitations period would apply to the foreign part of a through shipment.

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# Supreme Court of the United States

OCTOBER TERM, 1966

No. 346

VON DER AHE VAN LINES, INC.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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September, 1966

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## REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petition herein seeks review of a decision of the United States Court of Claims applying the three-year statute of limitations set forth in Section 204 a of the Interstate Commerce Act, 49 U.S.C. §304 a, to a claim for transportation performed for respondent in a foreign country. The pertinent jurisdictional provisions, statutes involved, the facts of the case, and the opinion of the Court below are set out in our petition. This reply is directed solely to the contents of respondent's Memorandum in Opposition.

Petitioner respectfully represents, as detailed below, that rather than detracting from our petition, respondent's Memorandum in Opposition demonstrates the untenable character of the decision below, and corroborates the need for consideration by this tribunal of the issue involved.

1. First, it is apparent that respondent finds itself unable to defend the decision below on the rationale upon which the decision was based. As respondent at first recognizes (Memorandum in Opposition, p. 2), the Court of Claims did not hold that Section 204 a of the Interstate Commerce Act applied by its terms to the subject transportation, but rather that petitioner had subjected itself to this limitations provision by reason of its participation in a so-called "Section 22" quotation. Nevertheless, respondent states that the decision below was correct *because "petitioner was a 'common carrier by motor vehicle subject to' the Act."* (Memorandum in Opposition, p. 3). The Court of Claims, we point out, *expressly refused* to decide the case on this ground, *i. e.*, the Court refused to hold, as respondent had also urged below, that Section 204 a applied to all actions at law brought by motor carriers for the recovery of their freight charges. (R. 63). As to the merits of respondent's statement, we repeat, as stated in our petition, that the provisions of the Interstate Commerce Act do not apply to transportation performed outside of the United States, and that petitioner was not a common carrier subject to the Act insofar as the present suit is concerned, which is limited to a claim for transportation performed in a foreign country.

All that respondent is able to state in defense of the rationale of the Court below is that "the Ninth Circuit reached a similar conclusion in an analogous

situation (see *United States v. Francis*, 320 F.2d 191, 195), and no decision of any Court is in conflict with these rulings." (Memorandum in Opposition, pp. 3-4).

First, we submit that the *Francis* case, *supra*, is not only wrong, but is inexplicable. The question presented in *Francis*, as there stated by the Court, was "whether or not appellant [the United States] could bring an action for restitution under Section 322 of the Transportation Act of 1940." (*Ibid.*, p. 195). After noting the appellee-carrier's contention that section 322 did not apply because the transportation involved was strictly intrastate transportation, the Court concluded that "by becoming a party to the Loretz [section 22] quotation, appellee must be considered to be within the meaning of the section 322 phrase 'common carrier subject to the Interstate Commerce Act' [and that] appellee . . . has waived any claim he is excluded under section 322." (*Ibid.*, p. 195). Aside from the merits of this rationale (see our Petition, pp. 7-8), the Court appears oblivious to the fact that Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, applies only to the administrative handling of claims before the General Accounting Office, *and has nothing whatever to do with actions at law.*

This was in fact recognized by the Court of Claims only a month after the present case was decided (See *Iran National Airlines Corporation v. United States*, Ct. Cl. No. 241-64, decided May 13, 1966), and we are, consequently, at a complete loss to understand the reliance which the Court of Claims placed on the *Francis* case in the case at bar.

Second, it is simply not true that "there is no decision of any Court in conflict with the *Francis* case and the decision herein." (Memorandum in Opposition, p. 4). In our petition, we cited, *inter alia*,

the case of *Thompson, Trustee, Great Northern R.R. Co. v. Millwhite Company*, 292 S.W. 2d 148 (1956), which is in *direct* conflict with both of these cases. (Petition, p. 7).

2. After abandoning the rationale relied upon by the Court below, respondent proceeds to argue that petitioner was a carrier subject to Part II of the Act since the transportation here involved was "in foreign commerce." (Memorandum in Opposition, pp. 4-5). When scrutinized, respondent's argument is revealed to be absolute "double talk." First, respondent quotes Section 203(a)(11) of the Interstate Commerce Act, 49 U.S.C. §303(a)(11), wherein the term "foreign commerce" is defined, but respondent conveniently omits to include the last portion of this provision reading "insofar as such transportation takes place within the United States." (Memorandum in Opposition, p. 4).[1] (See also letter from the Interstate Commerce Commission to Senate Committee on Interstate and Foreign Commerce, appended to Senate Report No. 2258, 81st Cong., 2d Sess. (1950)). Respondent then proceeds to argue that the shipments here involved "clearly were in foreign commerce within the purview of the Act." (Memorandum in Opposition, pp. 4-5). Respondent states:

> "This is so even if, as petitioner appears to contend, 'foreign commerce' is, for all purposes, limited to the portion of transportation taking place within the United States. Since the bills of lading involved here, which are the contracts upon which petitioner's action must be based, clearly covered transportation of property in foreign commerce, petitioner cannot escape the

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[1] The full text of this provision is set out at page 11 of our petition.

> fact that it is a carrier subject to the Act and therefore bound by the limitations period of Section 204a." (Memorandum in Opposition, p. 5).

It is difficult for us to conceive of a better example of "double talk." As set forth in our Petition, Section 202(a) of the Interstate Commerce Act provides "that the provisions of this part [which encompasses Section 204a, the subject limitations provision] apply to transportation. . . in interstate or foreign commerce: . . ," and Section 203(a)(11) then defines "foreign commerce" as "commerce. . . between any place in the United States and any place in a foreign country. . . *insofar as such transportation takes place within the United States.*" (See Petition, pp. 4-5). There is no doubt that the shipments involved herein were in "foreign commerce" within the ordinary meaning of that term. They were not, however, in "foreign commerce" as that term is used in the Interstate Commerce Act. It should be so obvious at this late date as not to require statement that the provisions of the Interstate Commerce Act apply to transportation in foreign commerce *only to the extent that such transportation is performed within the United States*. Respondent, however, apparently does not accept this proposition.

3. Lastly, respondent argues that Section 204 a was designed to cure the anomaly created by the application of a six-year statute of limitations to suits against the Government, and a two-year limitations period to suits by the Government against carriers, and that:

> "Petitioner would now create a new anomaly by applying the Interstate Commerce Act's three-year limitation to suits based on the domestic portion of contracts of carriage from this country

to another and the Court of Claims Act's six-year limitation, in suits *against* the government for the foreign portion of the same cause of action." (Memorandum in Opposition, p. 6).

Respondent further states (in footnote 5) that:

"Under petitioner's theory suits *by* the government for overcharges with reference to the foreign portion of a single through shipment apparently would not be subject to any statute of limitations whatever. In suits between private parties, it is unclear what limitations period would apply to the foreign part of a through shipment." (Memorandum in Opposition, p. 6).

Prior to the 1958 amendments, there was no statute of limitations whatever applicable to actions at law by the Government against carriers. The two-year limitations period referred to by respondent appears in Part I of the Interstate Commerce Act (Section 16(3)(b), 49 U.S.C. §16(3)(b)), and relates solely to complaints filed with the Interstate Commerce Commission, *not to actions at law*. This provision was not changed by the 1958 amendments (it is still two years), and there is no comparable provision at all in Part II of the Interstate Commerce Act (the Motor Carrier Act). See *T.I.M.E., Inc. v. United States*, 359 U. S. 464, 79 S. Ct. 904 (1959).[2] Under Part II of the Act there was, prior to 1958, a two-year statute of limitations, applicable to both shippers and carriers, for actions at law for the recovery of transportation charges subject to the Interstate Commerce

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[2] This was, in fact, recognized by respondent in the Court below. (See page 11 of "Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment.")

Act, but this limitations provision was held not to apply to the Government. See *United States v. Yale Transport Corporation*, 184 F. Supp. 42 (1960).

Thus, the situation prior to 1958 with respect to actions at law, by or against motor carriers, for the recovery of transportation charges subject to the Interstate Commerce Act was as follows: there was a two-year statute of limitations applicable both to carriers and private shippers. The Government, however, was not bound by any limitations provision with respect to suits by it *against* motor carriers, but motor carriers suing the Government in the Court of Claims were bound by the six-year statute of limitations which is there generally applicable. The 1958 amendments to the Motor Carrier Act effected two principal changes, *viz.*, (1) extending the limitations period from two to three years, and (2) making this limitations period applicable to the Government in like manner as it applies to private shippers. These amendments did not, however, have any bearing whatever on transportation performed outside the United States.

As to claims for freight charges for transportation performed outside of the United States (which is here involved), neither before, nor after 1958, were suits relating to such transportation affected by any provisions (including the limitation of actions provisions) set forth in the Interstate Commerce Act. A suit between a carrier and a private shipper relating to foreign transportation was and is governed by the statute of limitations applicable in the jurisdiction where the suit is brought; and as to the Government, suits by the Government against carriers relating to such transportation are still not subject to any limitations period, but suits by a motor carrier against the

Government are subject to the same six-year period of limitations which is applicable in the Court of Claims. If, therefore, there is any "inequity" with respect to suits relating to foreign transportation, *it is an inequity to the carrier*. But until Congress sees fit to legislate a statute of limitations provision applicable to foreign transportation, the Government is not bound by any limitations provision whatever with respect to such claims, and the carriers are limited only *by the six-year period which is applicable in the Court of Claims*. The limitations provisions contained in the Interstate Commerce Act cannot be used to judicially legislate a statute of limitations, as respondent would have, and as was done by the Court below.[3]

## CONCLUSION

We respectfully submit that respondent's Memorandum in Opposition pointedly demonstrates the confusion which exists in this area of the law, and serves to underscore the need for review by this tribunal of the decision below.

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[3] Respondent would apparently go even further than did the Court below, and would apply the limitations provisions of the Interstate Commerce Act even to shipments both originating in, and destined to a foreign country.

WHEREFORE, petitioner again respectfully prays that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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September, 1966